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No. 88-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

METROMEDIA, INC., et al.,

Petitioners,

v.

APRIL ENTERPRISES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California Second Appellate District

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF OF RESPONDENT

This Supplemental Brief is filed pursuant to Rule 22.6 of the Court's Rules for the purpose of addressing certain issues raised by this Court's decision on June 26, 1989, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556.

A. *Browning-Ferris* As Applied To Question No. 1—The Substantive Due Process Issue.

In *Browning-Ferris*, the majority opinion leaves "for another day" the question of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" (citation omitted; Slip Op. p. 18). The Court cites, by way of illustration, *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

Similarly, in his concurring opinion in *Browning-Ferris*, Justice Brennan notes as follows:

> "Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable,' *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)." (Further citations omitted; Slip Op.; Justice Brennan concurring, p. 1)

Justice Brennan also expressed the following concern:

> "Without statutory (or at least common-law standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts.' App. 81. Guidance like this is scarcely better than no guidance at all." (*Id.* at pp. 1-2.)

1. The Punitive Damage Instruction Given To The Jury Here, If It Be Constitutionally Flawed, May Not Afford Metromedia A Basis For Reversal As Metromedia Requested The Instruction.

Justice Brennan was of the opinion that the instruction given in *Browning-Ferris* "reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." (*Id.* p. 2.)

As discussed below, the instruction given in our case provided significantly more guidance based on the more developed statutory and common law of California. Nevertheless, even if this instruction were determined to be similarly "flawed," that "flaw" is directly attributable to the complaining party herein, i.e., Petitioner. *It was Metromedia itself who requested that the jury be instructed on punitive damages.* It specifically requested the trial court to give the jury a plenary instruction with respect to the recovery of

punitive damages (Defendant's Requested Jury Instruction No. 85; C.T. pp. 1018-1020, attached to Opposition to Petition for Writ of Certiorari as Appendix D).

This instruction, absent a parenthetical sentence tagged on at the end and deleted by the trial court as lacking in evidentiary support, was in fact given to the jury (Instruction No. 67; C.T. p. 1227).

California law on this point is clear, decisive and fatal to Metromedia's attempt to raise the issue of the constitutionality of punitive damages.

> "It is well settled that a party cannot attack the substance of an instruction if he himself proposed similar instructions." *Weirum v. RKO General Inc.* (1975) 15 Cal.3d 40, 50.[1]

A party is simply not allowed to ask the trial court to provide a specific level of guidance regarding punitive damages to a jury by way of a detailed instruction, and then, after an unfavorable result, seek reversal in this Court on the grounds that the instruction *it requested* is "scarcely better than no guidance at all" or "reveals a deeper flaw."

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[1] Petitioner cannot argue that the trial court had already ruled that it was going to instruct on punitive damages and Petitioner was merely trying to get the best instruction it could. Metromedia's request for Instruction No. 85 was prepared on June 16, 1986 (C.T. p. 922) and was filed with the court on June 23, 1986. This was *well before* the trial court made any ruling as to whether it was going to allow the jury to decide punitive damages. Instructions were preliminarily discussed on June 25, 1986 (R.T. pp. 2076 et seq.) and the court ruled on the instructions on June 26, 1986 (R.T. pp. 2156 et seq.).

Similarly, if the Due Process Clause required that the jury be given an instruction which sets forth a greater level of guidance than that provided by the subject instruction, then why did Petitioner never draft, offer or request such an instruction? Instead, it affirmatively requested the trial court to give the instruction which was actually used.

This conduct by Petitioner is perfectly consistent with its decision not to raise *any* constitutional issues in any of its answers, to never raise such issues during the entire course of the first appeal, to never raise them in any of its three trial briefs, and to not raise them in its post-trial motions. The first time that Metromedia ever *mentioned* the issue was in its reply brief in response to plaintiff's opposition to its post-trial motions and opposition to plaintiff's post-trial motion to amend to conform to proof—*ten years after the litigation commenced*. The case proceeded to trial, and the jury heard all the evidence and Petitioner never claimed any of the constitutional rights now asserted.

Even when it did first allude to constitutional concerns, in its post-trial reply brief (see Appendix F, pp. 39a-43a of Petition for Writ of Certiorari herein), Petitioner elected to argue that the punitive award "constitutes invidious discrimination" in violation of the Equal Protection Clause, an excessive fine under the Excessive Fines Clause, and a violation of procedural due process because the trial court did not observe "any of the safeguards normally associated with penal-type proceedings under the guise that such punishment is purely 'civil' in nature" (citation omitted; *id.* at p. 41a). It did not raise the *substantive* due process issue, i.e., that the Due Process Clause

forbids damages awards that are "grossly excessive" or are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."

2. Neither California Statutory And Common Law On Punitive Damages Nor This Judgment Violate Principles Of Substantive Due Process.

The majority opinion in *Browning-Ferris* framed the unanswered question as follows:

> "whether due process acts as a check on *undue jury discretion* to award punitive damages in the absence of any express statutory limit" (Slip Op. at p. 18; emphasis added).

In a similar view, Justice Brennan wrote as follows:

> "Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, *juries are left largely to themselves* in making this important, and potentially devastating, decision." (Concurring Opinion of Justice Brennan, p. 2; emphasis added.)

Here, there is no "undue jury discretion" and juries are not "left largely to themselves." As pointed out in Respondent's Opposition to Petition for Writ of Certiorari, pp. 18-23, California punitive damage jurisprudence affords strict appellate review of such awards (so that only 9% of such awards survive review [see Appendix F to Opposition]) after the trial court, which sits as an "independent trier of fact," on a motion for new trial, reweighs the evidence for excessiveness.

In light of existing common law standards in California, it is unnecessary to declare that the Due Process Clause forbids punitive damage awards which are "grossly excessive" or "wholly disproportioned." Compare the substantive due process standards articulated in *Waters-Pierce Oil Co. v. Texas, supra*, and *St. Louis I.M. & S.R. Co. v. Williams, supra*, with the common law standard of appellate review of punitive damage awards in California:

> "[A]n appellate court may reverse such an award only 'when the award as a matter of law appears *excessive*, or where the recovery is so *grossly disproportionate* as to raise a presumption that it is the result of passion or prejudice.' " (Emphasis added.) *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 926.

More importantly, *this particular punitive damage award* did not violate any recognized standard of substantive due process.

The award of punitive damages bore a ratio to compensatory damages of $3^1/_2$ to 1, i.e., a little more than treble damages.

The 14 million dollar punitive award was based on the 1985 assets of the defendant of 2.5 billion dollars and is equivalent to one week of defendant's net income.

The conduct of the defendant, as a factor to which the amount of punitive damages must be proportional, was egregious and outrageous. This is not a judgment based on a disputed insurance claim or a defective product. The facts established *direct evidence* of actual malice and fraud on the part of Metromedia. Metro-

media harbored an actual intent to injure April and acted out of spite. According to its Vice President, at a time when it had no right to syndicate and was trying to wrest such rights from April, Metromedia gave April an "ultimatum" to sign an oppressive deal or have the tapes erased "so that he'd never be able to go forward with his syndication," and then destroyed the tapes "to show him." Metromedia was a fiduciary and a trustee with respect to April. The trier of fact, the trial court, and the court of appeal found malice and made a positive finding of fraud. The state supreme court refused to alter these factual findings.

Principles of substantive due process were not violated here.

B. *Browning-Ferris* As Applied To Question 2—The Excessive Fines Clause Issue.

This issue was expressly resolved against Petitioner's position in *Browning-Ferris*.

C. *Browning-Ferris* As Applied To Question 3—The Procedural Due Process Issue.

Petitioner argues that the Due Process Clause is violated in punitive damage cases "unless defendants are afforded some or all of the procedural rights enjoyed by defendants in criminal proceedings." (Petition, p. i.) Thus, Petitioner notes that,

> "in a criminal trial a defendant would be entitled to important procedural protections, including a standard of proof beyond a reasonable doubt, before punishment could be imposed." (Petition, p. 15.)

Again, Metromedia is in no position to contend that its procedural due process rights were violated by having the punitive damage issue decided by a preponderance of the evidence instead of some heightened standard of proof. Although Metromedia successfully convinced the trial court to have the jury decide the "superseded contract" issue by "clear and convincing evidence" (see Appendix E to Respondent's Opposition to Petition), again, *it was Petitioner who insisted that the punitive damage issue be decided by a "preponderance of the evidence"* (see Appendix D to Opposition). Thus, any procedural due process infirmity rests at the feet of Petitioner itself. *It* asked the trial court to instruct on punitive damages. *It* asked the trial court to instruct the jury on preponderance of the evidence.

CONCLUSION

This litigation is on the threshold of entering its fourteenth year. It has been tried twice. It has gone up and down the appellate ladder twice. For the past year, it has been held by this Court, presumably to await the resolution of *Browning-Ferris*.

In light of all of these factors, it is respectfully submitted that the Petition, at this time, be denied.

Respectfully submitted,

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